

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v.

16 CR 371 (RA)

GARY HIRST,

Defendant.

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New York, N.Y.
September 7, 2018
3:30 p.m.

Before:

HON. RONNIE ABRAMS,

District Judge

APPEARANCES

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York
BRENDAN FRANCIS QUIGLEY
NEGAR TEKEEI
REBECCA GABRIELLE MERMELSTEIN
Assistant United States Attorneys

BARRY LEVIN
Attorney for Defendant

ALSO PRESENT: Shannon Bieniek, FBI

1 (Case called)

2 THE DEPUTY CLERK: Counsel, please state your names
3 for the record.

4 MR. QUIGLEY: Good afternoon, your Honor. Brendan
5 Quigley, Rebecca Mermelstein, and Negar Tekeei for the
6 United States. We're joined by FBI agent Shannon Bieniek.

7 THE COURT: Good afternoon everyone.

8 MR. LEVIN: Barry Levin on behalf of Mr. Hirst.

9 Good afternoon, everyone. Good afternoon, Mr. Hirst.

10 So this matter is on for sentencing in United States
11 v. Hirst. Mr. Hirst plead guilty in May before
12 Magistrate Judge Moses, and I'm now formally going to accept
13 that plea on the record.

14 In connection with today's proceeding, I've reviewed
15 the following submissions: The revised presentence report
16 dated August 29 of 2018; Mr. Hirst's sentencing memorandum
17 dated August 31 with accompanying exhibits; his prior
18 sentencing memorandum filed in the case before Judge Castel and
19 filed under seal; as well as various medical records and
20 documentation; as well as the government's sentencing
21 memorandum dated September 4.

22 Have the parties received each of these submissions?

23 MR. QUIGLEY: Yes, your Honor.

24 MR. LEVIN: Your Honor, I believe there might be --

25 there is a medical summary, an update, dated August 8 from 5th

1 Avenue Forensics, which is a neurological evaluation Mr. Hirst
2 had this summer. That was also submitted to the Court.

3 THE COURT: Yes. I have reviewed that as well. I
4 also have your August 13 letter, but I have considered all of
5 those submissions.

6 MR. LEVIN: Thank you, your Honor.

7 THE COURT: Great. Thanks.

8 So why don't we begin by discussing the presentence
9 report.

10 Have you reviewed the presentence report and discussed
11 it with your client?

12 MR. LEVIN: I have, your Honor.

13 THE COURT: You've noted a number of objections. So
14 why don't we talk about them.

15 First, with respect to the amount of loss, what is
16 your basis for arguing that the loss did not exceed
17 \$25,000,000?

18 MR. LEVIN: Your Honor, as set forth in my initial
19 objection letter, Mr. Hirst was only involved in the first
20 round of the bond sales. As set forth in my submissions, he
21 basically was there for three days at Hughes Capital.

22 He never was a formal employee. His role was limited
23 to calculating interest. It's our position that when he signed
24 the trade tickets, he was no different than a secretary acting
25 in a ministerial act. He had no authority.

1 Subsequent to his three days present there, his other
2 involvement was opening the WAPC account where the proceeds
3 went, but he acted in an ministerial act. As your Honor is
4 aware -- your Honor sat through a long trial -- it was
5 controlled by Mr. Dunkerley.

6 Thereafter, Mr. Hirst had nothing to do with the
7 second and third round of bond acquisitions. I believe that
8 took place in Atlantic. Mr. Hirst was never there. He was not
9 an employee.

10 It was not even foreseeable to Mr. Hirst that that
11 company was going to be acquired. He had no communication with
12 Mr. Galanis. A review of the emails during this time period
13 does not show anything attributed to Mr. Hirst. All of the
14 emails are going back and forth between Michelle Morton and
15 Galanis concerning the second and third rounds of bond
16 acquisition.

17 THE COURT: But the pension funds that purchased the
18 first tranche of the bonds never recovered any portion of their
19 principal of \$27 million. Right? Why is that not alone
20 sufficient for the enhancement to apply?

21 MR. LEVIN: Because I believe under the guidelines --
22 I quote from the section in my objections -- they were given
23 back 2,000,700 some odd thousand dollars in interest in
24 dividend payments which is an offset to the initial
25 acquisition.

1 THE COURT: Do you want to respond, Mr. Quigley?

2 MR. QUIGLEY: Yes, your Honor. I think your Honor is
3 right that the pension funds are out \$25 million. They never
4 out -- sorry \$27 million. They never got any of their
5 principal back. That is alone sufficient to go over 25.

6 I don't think we even need to get to the issue. It's
7 just not right that Mr. Hirst wasn't involved in the subsequent
8 bond transactions. He played a different role, but we go
9 through it in detail with our sentencing submission.

10 I'm not going to rehash it here. It was certainly
11 foreseeable to him that additional money, certainly enough to
12 get over the \$25 million hump in that next rung of the loss
13 ranges, was being misappropriated.

14 THE COURT: I agree with you on both fronts. I think
15 for the reasons stated in your letter and the reasons I noted,
16 it seems clear to me that the loss amounts exceeded \$25 million
17 and, as I noted, the pension funds that purchased the first
18 tranche never recovered any portion of their principal of the
19 \$27 million which alone is sufficient, but I also agree with
20 you with respect to his broader role.

21 MR. QUIGLEY: They did get -- it is true the first
22 interest payment was made in September of 2015 with the
23 proceeds of the final issuance. So the pension funds did get
24 some money back.

25 I think, again, given Mr. Hirst's involvement in the

1 subsequent issuances and in fact his involvement in repaying
2 back the pension funds' interest with the proceeds of the third
3 issuance, the subsequent issuances were clearly foreseeable to
4 him.

5 So I think, for that reason alone, you have the \$27
6 million from the first issuance and the \$16 million for the
7 third issuance were all foreseeable to him.

8 THE COURT: Do you want to be heard further on that?

9 MR. LEVIN: Your Honor, just briefly. I'm relying on
10 application note 3E1 of Section United States Sentencing
11 Guidelines 2016 2B1.1.

12 That application note, your Honor, basically states
13 that an offset should be credited regardless of its source, and
14 that's where I'm coming up with this argument.

15 MR. QUIGLEY: Your Honor, two things in response to
16 that. It does say that, and Mr. Levin is correct. That's a
17 different argument than he made in his objections to the PSR.
18 In the objections to the PSR, he said that Mr. Hirst should be
19 credited for monies paid to the WLCC, which is not right
20 because the pension funds were still out their money. Even
21 if -- and it may be right under the application note.

22 Even if Mr. Hirst gets some setoff for the \$2 million
23 or \$2.7 million that was paid back to the pension funds in
24 interest such that the pension funds are only out
25 \$24.3 million, say, it's still clearly reasonably foreseeable

1 to him that the \$16 million from the third issuance would be
2 misappropriated, given his involvement in misappropriating
3 that. That alone makes the loss well more than \$25 million.

4 MR. LEVIN: Your Honor, if I may just reply.

5 THE COURT: You can respond.

6 MR. LEVIN: Thank you, Judge.

7 As previously said, Mr. Hirst wasn't there. He was
8 not a party. Nor was he aware of where the source of the money
9 came from a year later. He was not physically present. He was
10 not managing the bank accounts. All of this was being done by
11 Mr. Dunkerley. Mr. Hirst was out of the picture at that point.

12 To the extent we are talking about the loss amount and
13 his responsibility for the total loss, he's not there. It's
14 not reasonably foreseeable under 1B1 of the guidelines that
15 Mr. Hirst is even aware Atlantic is going to be opened up.

16 I would ask the government to submit to this Court one
17 indicia of evidence that Mr. Hirst was aware of Atlantic and
18 dealt with Atlantic. That's my point.

19 MR. QUIGLEY: Judge, he had control of the WLCC
20 account. There were emails -- he opened that account. He
21 clearly could see the money coming into that account from the
22 Atlantic investors, and there are emails that he's involved in
23 wiring that out.

24 We cite on page 2 of our sentencing submission,
25 Government's Exhibit 1583 where he and Dunkerley and Galanis

are discussing using fund from the WAPC account to pay off Galanis' American Express bill; Government Exhibit 1587 where he's directing the \$2.4 million wire out of the WAPC account to Burnham; Government Exhibit 1436, an email from Mr. Hirst to Andrew Godfrey attaching information about a wire from the WAPC account to Seymour Capital, Seymour Capital of course being one of the entities that Mr. Hirst had created in somebody else's name after buying shares in the Code Rebel IPO with the proceeds of the final bond issuance. We really don't think it's a close question that the loss amount for the third issuance was reasonably foreseeable to him.

THE COURT: I agree with the government that it was reasonably foreseeable to him for all the reasons that I just noted. So I agree with the calculation in the presentence report with respect to loss amount.

Is there also still an objection to the two-level enhancement for the offense involving ten or more victims?

MR. LEVIN: I have not asserted an objection, your Honor, but I will rely on my papers.

THE COURT: That's fine. I'll just rule on it.

I think this enhancement clearly applies in my view. Mr. Hirst's objection appears to be on the basis that only nine of the victims, the pension funds, were reasonably foreseeable to him.

But the number omits the Wakpamni Lake Community

1 Corporation. It belies common sense to think, particularly
2 given Mr. Hirst's role in setting up the annuity provider to
3 which the WLCC's money was deposited if he did not foresee it
4 as a victim, even if he personally didn't make any
5 misrepresentations.

6 Do you also want to be heard with respect to the
7 four-level enhancement for being associated with an investment
8 adviser, do you want to rely on your brief in that respect?

9 MR. LEVIN: Your Honor, once again, I'm going to rely
10 on my previous submission and both my objections to the extent
11 I comment on them in my sentencing memo. I believe that's a
12 close question.

13 It's our position that Mr. Hirst's acts were that of a
14 secretary, ministerial. He had no decision-making. He wasn't
15 an employee. He did not advise or communicate with any of the
16 victims of this crime.

17 THE COURT: Just give me one second.

18 The argument by Mr. Hirst, in my view, is devoid of
19 merit. As the government notes, it's undisputed that Hughes
20 qualified as an investment adviser. Moreover, all employees of
21 an investment adviser are considered to be associated pursuant
22 to application note 15 of Section 2B1.1 of the sentencing
23 guidelines.

24 To the extent Mr. Hirst is arguing that he doesn't
25 qualify because he was clerical or ministerial staff, that

argument is unpersuasive in my view.

As in initial matter, while Mr. Hirst's tenure at Hughes may have been relatively short-lived, he was held out as the chief investment officer and signed trade tickets affecting transactions which is far from being a member of the clerical or ministerial staff.

Even assuming that he was such a staff member, the language on which he relies doesn't support his argument. In fact, the pertinent provision of the Investment Advisers Act specifies that only for purposes of another section of the act shall clerical or ministerial staff be excluded, not for purposes of establishing the scope of this sentencing enhancement. See 15 U.S.C. Section 80B-2(a)(17).

This outcome is also in accord with Judge Lynch's decision in *United States v. Emminger*, 329 F.Supp.2d at 420 to 21, which concerned an analogous situation.

So finally, do you want to be heard on the minor role? Or do you want to also rely on your submission?

MR. LEVIN: I'll rely on my submission, your Honor.

THE COURT: So I'm not going to apply the minor role reduction. I've considered the relevant factors set forth in application note 3(C) to Section 3B1.2, and I just don't see how the reduction applies here.

Mr. Hirst is obviously correct in noting that he played a less significant role in the overall conspiracy than

1 Jason Galanis, but that's not the relevant inquiry. Rather,
2 the enhancement applies if the defendant is less culpable than
3 most other participants in the criminal activity.

4 As the government notes, all six of the individuals
5 indicted with Jason Galanis have asserted some form of the same
6 offense in pinning the blame on him. In the Court's view,
7 Mr. Hirst is not substantially less culpable than his other
8 five codefendants.

9 Among other activities, he set up the annuity
10 provider, Wealth-Assurance Private Client, that was supposed to
11 invest the bond proceeds on behalf of the WLCC; established the
12 bank account associated with the annuity provider into which
13 the bond proceeds were deposited; acted as an adviser when
14 several of his coconspirators closed the transaction to acquire
15 Hughes Capital Management, a registered investment adviser;
16 remained associated with Hughes after the acquisition during
17 which time he analyzed client portfolios, was held out as the
18 chief investment officer, and failed to disclose the numerous
19 conflict of interest related to the purchase of the WLCC bonds
20 on behalf of Hughes' clients, even though he signed the tickets
21 effecting those trades; provided advice related to the
22 conspirators' later acquisition of another registered
23 investment adviser, Atlantic Asset Management; wired criminal
24 proceeds from the account associated with an annuity provider
25 to fund the purchase of the European fund, that fund to pay

1 American Express charges made by Jason Galanis, the undisputed
2 mastermind of the fraud; participated in the purchase of
3 87 percent of the shares offered in the Code Rebel IPO using
4 misrepresented bond proceeds; and helped facilitate the initial
5 interest payment on the bond sold in the first instance which
6 prevented the fraud from being detected sooner. So I think
7 there is no basis to apply the minor role reduction.

8 Do you have any other objections to the PSR?

9 MR. LEVIN: I do not, your Honor.

10 THE COURT: Mr. Hirst, did you have enough time and
11 opportunity to review the presentence report and raise any
12 problems that you might have with it with your attorney?

13 THE DEFENDANT: Yes, your Honor.

14 THE COURT: Does the government have any objections to
15 the presentence report?

16 MR. QUIGLEY: We don't, your Honor.

17 THE COURT: The Court adopts the factual findings in
18 the report. The presentence report will be made part of the
19 record in this matter and placed under seal. If an appeal is
20 taken, counsel on appeal may have access to the sealed report
21 without further application to the Court.

22 Mr. Hirst, when you pled guilty, you discussed the
23 sentencing guidelines with Magistrate Judge Moses which are a
24 set of rules published, as you know, by the Sentencing
25 Commission in order to guide judges when they impose sentence.

1 Although at one time they were mandatory, meaning
2 judges were required to follow the sentencing guidelines, they
3 are no longer mandatory. But judges must nonetheless consider
4 the guidelines in determining a sentence and thus must make
5 sure that they have calculated them properly.

6 Based on my independent evaluation of the sentencing
7 guidelines, I accept the guidelines calculation in the
8 presentence report. I find that Mr. Hirst's offense level is
9 33, his criminal history category is II, and his recommended
10 guideline sentence is 151 to 188 months.

11 As I said a moment ago, that range is only advisory.
12 Courts may impose a sentence outside of that range based on one
13 of two legal concepts, a departure or a variance. A departure
14 allows for a sentence outside of the advisory range based on
15 some provision of the guidelines themselves.

16 My understanding is you're not seeking a departure
17 but, rather, a variance pursuant to 18 U.S. Code, Section
18 3553(a). Is that correct?

19 MR. LEVIN: That is correct, your Honor. Based on
20 Mr. Hirst's medical condition.

21 THE COURT: I have nonetheless considered whether
22 there is an appropriate basis for a departure from the advisory
23 range within the guidelines system. And while recognizing that
24 I have the authority to depart, I don't find any grounds
25 warranting a departure under the guidelines.

I do have the power, as we discussed, to impose a non-guideline sentence based on what we call a variance, and with that, I'm happy to hear from the parties.

Does the government wish to be heard, or do any victims wish to be heard today?

MR. QUIGLEY: Your Honor, we'll rest on our submission, unless the Court has any questions.

THE COURT: Does defense counsel want to be heard?

MR. LEVIN: I would, your Honor, briefly.

Your Honor, Gary Hirst, prior to 2007, had an unblemished life. He was in the financial industry for many years prior to his meeting Jason Galanis.

As set forth in the presentence report, there was actually a point in time where he was managing \$600 million. He never had a claim, civil or criminal. He never had an investigation. He never had a subpoena. Then he met Jason Galanis.

As set forth in my submission, Mr. Hirst, although a very intelligent man before his onset of his current medical conditions, will I'll address a little further -- he's naive. He was a loner. He was an academic.

He was enamored by Jason Galanis. He was -- Jason Galanis was a hero to Mr. Hirst. Mr. Hirst very gullible. He accepted everything that Mr. Galanis told him. Mr. Galanis had him stay in Beverly Hills. Mr. Hirst became very impressed

1 with him. Gary Hirst became a pawn on a chessboard that was
2 moved around the country for Galanis' different schemes.

3 And Mr. Hirst, although certainly academically
4 intelligent enough, should have questioned. He never
5 questioned. He did what he was told.

6 But while this was going on, your Honor, he also was
7 in the onset of dementia, which has now resulted, at least
8 according to Dr. Baldwin's summary, he has Alzheimer's.

9 When you look at the prior presentence report, there
10 is the medical background where they say he has dementia. It's
11 affecting his reasoning. It's affecting his memory, his
12 clarity, his ability to think, his ability to reason.

13 I do not profess to be a neurologist, but I submit to
14 your Honor that Mr. Hirst's actions were criminal, were
15 serious. But there was not the moral turpitude to personally
16 become a multimillionaire as Mr. Galanis. He was merely trying
17 to please his friend. As a result of that, he sits here before
18 you now twice convicted of fraudulent conspiracies in the
19 financial markets.

20 Currently, Mr. Hirst weighs 130 pounds. He stands 6'
21 1". When he arrived in New York, he was 155 pounds. He's
22 reaching a point where he is unable to even manage his
23 nutrition and manage his affairs.

24 The Alzheimer's is only going to get worse. Should
25 this Court sentence Mr. Hirst to his guidelines or anything

close to his guidelines, there is a very strong likelihood he will die in prison without the proper medical care he needs.

I think it's also important to point out that we readily acknowledge Mr. Hirst's company receiving \$1.3 million in this case. However, I want the Court to understand that Mr. Hirst did not put that money in his pocket.

He actually remitted that money to Insurance Companies of America to pay claims because they had outstanding settlement claims, workman's comp claims. Those funds literally went from Thorsdale to Rosemary, to ICA. Mr. Hirst did not travel Europe. He did not put the money in the bank. He did not buy a Rolls Royce. He did not do anything.

That doesn't mean he's innocent of the crime, but I'm trying to make a point -- and I don't know if I'm making it clearly -- that he didn't do it for his personal benefit. His crimes were based on a child-like mentality with his hero worship of Mr. Galanis.

THE COURT: He was far from a child.

Wouldn't you agree?

MR. LEVIN: Well, he's 66 years old, but I don't think somebody with his education and his life experiences, prior to meeting Mr. Galanis, was thinking on his own or thinking clearly.

I've spent a lot of time with Mr. Hirst in the past several months, since January when they brought me into the

1 case. There are days he knows what's going on, and there are
2 days he doesn't know what's going on. He's sometimes more
3 clear than others.

4 He's already serving 78 months from the prior
5 conviction. He's a year into that sentence. For the reasons
6 set forth in my sentencing memorandum and for the statements
7 that I've just made before this Court, we're asking this Court
8 to give us a substantial variance and hopefully give him a
9 concurrent sentence.

10 Mr. Hirst -- I had a case before Judge Kaplan very
11 recently, and he made a great statement. We're not all
12 sinners, and we all have good in us. Well, Mr. Hirst has
13 plenty of good in him as well. If the Court has had the
14 opportunity to read all the letters that were submitted --

15 THE COURT: I have.

16 MR. LEVIN: -- he has spent a good portion of his life
17 helping others and taking money out of his own pocket. None of
18 this condones his involvement in the conspiracy, but what it
19 does show is there are characteristics to this individual that
20 are good and that he is not someone that the criminal justice
21 system will ever have to worry about again.

22 So I am asking the Court to consider a concurrent
23 sentence for Mr. Hirst, knowing full well he has 78 months
24 ahead of himself, less a year.

25 THE COURT: What kind of message do you think I'd be

1 sending to the victims if I gave a totally concurrent sentence
2 in this case? If he didn't get any additional time based on
3 his conduct here that was alleged in this case?

4 MR. LEVIN: Your Honor, I totally understand your
5 question. If Mr. Hirst was not suffering from the cognitive
6 issues he currently has, as well as the numerous physical
7 issues, I wouldn't even be asking for a concurrent sentence.

8 But I honestly believe that he is somebody with a lot
9 of medical issues. His Alzheimer's is only going to get worse,
10 and that is why I'm making the request I am.

11 Probation recommends 30 months. The government is
12 seeking five years. I don't envy your Honor. You have the
13 toughest job in the business. You have to figure out what the
14 right sentence is, considering the severity of the crime and
15 the individual that's before you today.

16 All I'm saying is that the individual that sits before
17 you today has numerous issues, and he's not walking out the
18 door and resuming his life any time soon.

19 THE COURT: All right. Thank you.

20 MR. LEVIN: Thank you.

21 THE COURT: Mr. Hirst, is there anything you would
22 like to say today?

23 MR. LEVIN: I'm sorry, your Honor. I didn't hear
24 that.

25 THE COURT: I said, Mr. Hirst, is there anything you

1 would like to say today? You have a right to be heard. I'm
2 happy to hear anything you would like to say.

3 (Defendant and counsel conferred)

4 THE COURT: You don't have to speak. I've read all
5 the letters submitted on your behalf. I read the submission
6 from your lawyer. But if there's anything you would like to
7 say to me today, if there's anything you would like me to
8 consider, I'm happy to do that. And you can take your time.

9 THE DEFENDANT: Your Honor, I'm so sorry. I feel so
10 stupid for trusting Jason, and I'm so sorry that people got
11 hurt. I'm so sorry. I'm so stupid. I'm not stupid. I'm --
12 what am I? I don't know what I am. I'm a nerd. Sorry. Thank
13 you, your Honor.

14 THE COURT: Thank you.

15 Is there any reason why sentence cannot be imposed at
16 this time?

17 MR. QUIGLEY: No, your Honor.

18 MR. LEVIN: No, your Honor.

19 THE COURT: So I'm required to consider the advisory
20 guidelines range of 151 to 188 months, as well as various other
21 factors that are outlined in a provision of the law that I
22 mentioned earlier. It's 18 U.S. Code, Section 3553(a), and
23 I've done so.

24 There is no real dispute I don't think about the
25 seriousness of the crime and the harm that it caused to one of

1 the poorest Native American tribes in the country, as well as
2 the clients of Hughes and Atlantic, pension funds held for the
3 benefit of transit workers and longshoremen and housing
4 authority workers and city employees, among others.

5 Mr. Hirst, over the course of two years, you helped
6 steal more than \$40 million from numerous pension fund clients
7 and left the Wakpamni Lake Community Corporation without money
8 for economic development and owing more than \$60 million on the
9 outstanding bonds.

10 As I noted in ruling on your application to apply the
11 minor role reduction, your involvement in this conspiracy, in
12 my view, was far from minor. Indeed, as opposed to several of
13 your codefendants, you were charged in all four counts of the
14 indictment. So I've considered your role. I've considered the
15 gravity of the crime. I've considered the number of victims
16 and how they were impacted.

17 In my view, a substantial sentence must be imposed to
18 reflect the seriousness of the offense, to promote respect for
19 the law, to provide just punishment for the offense, and afford
20 adequate deterrence to you and to others who may seek to engage
21 in similar criminal conduct.

22 I have also though considered you as a person, as I
23 must and as I should. I've considered your age, that you're
24 66. I've considered your medical issues, both physical and
25 mental, including the apparent onset of the Alzheimer's

1 disease.

2 And I've considered the fact that, by all accounts,
3 you lived a law-abiding life prior to developing a relationship
4 with Jason Galanis in 2007. But since that time, this is your
5 second securities fraud conspiracy with which you've been
6 involved, both of which caused significant losses to others, to
7 victims.

8 As the government notes in its submission, in 2017,
9 only 1.3 percent of defendants sentenced pursuant to Section
10 2B1.1, that provision of the guidelines, committed crimes
11 causing losses in excess of \$20 million. Mr. Hirst, you've now
12 done so twice.

13 It's true that compared to Jason Galanis, the admitted
14 mastermind of the fraud, you personally received significantly
15 less money, but \$1.3 million in criminal proceeds is still a
16 substantial amount, whether or not you spent it on cars and
17 jewelry or not, as your lawyer suggested.

18 You also played a key role in facilitating Jason
19 Galanis' much larger theft. So I've considered all of that,
20 and I've considered the other arguments that your lawyer has
21 made, including the need to avoid unwarranted sentencing
22 disparities.

23 As I noted, I read all the letters submitted on your
24 behalf from family and friends who describe you as loving and
25 supportive and compassionate. So I am ready to impose

1 sentence. So I am going to ask you, please, to stand.

2 It's the judgment of this Court that you be committed
3 to the custody of the Bureau of Prisons for a term of 96 months
4 on Count Two and 60 months on Counts One, Three, and Four to
5 run concurrent to each other and to the sentence imposed by
6 Judge Castel, and 36 months is to run consecutive. So it's a
7 total of 96. The 60 months is concurrent, and the 36 months is
8 consecutive many.

9 That term of imprisonment shall be followed by a term
10 of supervised release of three years on each count, also to run
11 concurrent.

12 I believe that this sentence is sufficient but not
13 greater than necessary to comply with the purposes of
14 sentencing set forth in the law.

15 I'm going to ask you just now to sit. Why don't you
16 be seated so that you're more comfortable.

17 Just to be clear, although this is a below-guideline
18 sentence, I view it as a very serious and substantial sentence,
19 as it should be, given Mr. Hirst's conduct. But this amount of
20 time, eight years, is a lot of time for someone to spend in
21 prison, particularly for someone who is his age and in his
22 condition, both physically and mentally. He'll be in his mid
23 70's when he's released.

24 I hope you use the time that you do have to reflect on
25 your actions.

1 With respect to the terms of supervised release, I'm
2 going to impose all of the standard conditions of supervised
3 release. They're on page 36 of the presentence report.

4 So I'm going to assume you all have read them. If
5 you'd like me to read them out loud, I'll do so. But all the
6 standard conditions on page 36 and 37 shall apply.

7 All the mandatory conditions -- they're also on page
8 36 -- shall apply as well.

9 You shall not commit another federal, state, or local
10 crime. You must not unlawfully possess a controlled substance.
11 You must refrain from any unlawful use of a controlled
12 substance.

13 You must submit to one drug test within 15 days of
14 release from imprisonment and at least two periodic drug tests
15 thereafter as determined by the probation department.

16 You must cooperate in the collection of DNA as
17 directed by the probation officer. And you must make
18 restitution in accordance with the law, and the various
19 provisions are there set forth on page 36 of the presentence
20 report.

21 In addition, I'm going to impose the special
22 conditions of supervision recommended by the probation
23 department.

24 You must report to the probation office in the federal
25 judicial district where you're authorized to reside within 72

1 hours of your release from imprisonment unless a probation
2 officer instructs you to report to a different probation office
3 or within a different timeframe.

4 After initially reporting to the probation officer,
5 you'll receive instructions from the Court or the probation
6 officer as to how and when you must report to the probation
7 officer, and you must report as instructed.

8 You must not knowingly leave the federal judicial
9 district where you're authorized to reside without first
10 getting permission from the Court or the probation officer.

11 I'm sorry. I'm reading the standard conditions. I
12 apologize. Let me just focus on the special conditions.

13 You are to participate in an outpatient treatment
14 program approved by the United States Probation Office which
15 may include testing to determine if you have reverted to using
16 drugs or alcohol.

17 You must contribute to the cost of services rendered
18 based on your ability to pay and the availability of
19 third-party payments.

20 The Court authorizes the release of available drug
21 treatment evaluations and reports, including the presentence
22 investigation report, to the substance abuse treatment
23 provider.

24 You are to provide the probation officer with access
25 to any requested financial information. You're not to incur

any new credit card charges or open additional lines of credit without the approval of the probation officer unless you're in compliance with the installment payment schedule. So those are the special conditions of supervised release.

I decline to impose a fine in light of the forfeiture and restitution orders that will be imposed. I am imposing a mandatory special assessment of \$400 which shall be paid immediately.

Pursuant to the order of restitution that was submitted, you shall pay \$43,785,176 in restitution to the victims of the offense as charged in Counts One, Two, Three, and Four.

Your liability for restitution will be joint and several with that of other defendants ordered to make restitution for the offenses in this matter. The names, addresses, and specific amounts owed to each victim are outlined on the schedule of victims, and that schedule will be filed under seal.

I know there was reference in the papers to forfeiting \$1.3 million, but I don't think I received an order.

MR. QUIGLEY: Yes, your Honor. We prepared a consent order of forfeiture to bring today. We're not going to be able to get consent for that. I won't get into that.

I don't think it's disputed that Mr. Levin referenced in his colloquy here that Mr. Hirst received \$1.3 million in

1 bond proceeds, and we'd ask the Court to orally include that in
2 the pronouncing of sentence, and we can provide the Court with
3 an order to that effect.

4 THE COURT: Mr. Levin, is that accurate? Are you
5 contesting the \$1.3 million?

6 MR. LEVIN: No, we are not, your Honor. We had
7 acknowledged his receipt of the \$1.3 million. I had a
8 disagreement with the language in the order. We were unable to
9 work it out.

10 THE COURT: I am going to impose forfeiture in the
11 amount of \$1.3 million. If there's an issue about the language
12 in the order, just highlight for me what's disputed.

13 MR. QUIGLEY: Yes, your Honor.

14 THE COURT: The order ultimately will become part of
15 the judgment in this case.

16 MR. LEVIN: Your Honor, two quick points. One, in the
17 Court's judgment, could they ask that he be expedited to be
18 returned to FCI Jesup, Georgia, so he can get some of the help
19 he needs.

20 He's isolated in the MCC. He's had a toothache for
21 four months. He can barely walk. He's not getting his
22 medication. I can go on and on, but I think the Court gets my
23 point.

24 THE COURT: Yes.

25 MR. LEVIN: Secondly, would the Court consider running

1 this sentence partially concurrent with his prior sentence?

2 THE COURT: What's the government's position on that?

3 MR. QUIGLEY: I don't think that's legally permissible
4 your Honor. Under 18 U.S. Code, Section 3585(b)(2) which
5 states that a defendant essentially cannot be given credit for
6 prior -- a defendant shall be given credit towards a service of
7 a term of imprisonment for any time he has spent in official
8 detention prior to the date of sentence the date sentence
9 commences; two, as a result of any other charge for which the
10 defendant was arrested after the commission of the offense for
11 which the sentence was imposed that has not been credited
12 against another sentence.

13 So the period that Mr. Hirst has been in jail before
14 today has been credited against his Gerova sentence. So he
15 can't or shouldn't get credit for that.

16 THE COURT: Do you want to respond to that on the law?

17 MR. LEVIN: Your Honor, I'm not sure I understand. I
18 don't have the statute in front of me, but I'm not sure I
19 understand the government's argument.

20 The BOP will not give him double credit anyway. The
21 credit he's received thus far off his 78-month sentence sits,
22 and they give it to him at the end of the sentence in case
23 there are any violations in jail, if he takes any programs and
24 the sentence is further reduced.

25 My application to run this sentence nunc pro tunc is

1 that since he will have -- this sentence overlaps the prior
2 sentence anyway. So he's not going to be able to get double
3 credit. However, the 36 months will kick in earlier, in my
4 belief, because your sentence will then run from the same time
5 as the prior sentence.

6 He's not going to get double credit. He only gets
7 credited for -- every day he gets, he gets that one day. The
8 BOP does not give anybody double credit. Nor am I asking the
9 Court to give him credit. I just want the sentencing date to
10 run from his sentencing which I believe was last August.

11 THE COURT: Explain to me what difference it will make
12 as a practical matter.

13 So he got a 78-month sentence before Judge Castel.
14 Presuming that he gets good time. Right? I think the estimate
15 probation gave is that his estimated release date on that
16 case -- was it June 2023? Is that right?

17 MR. QUIGLEY: That's right, your Honor.

18 THE COURT: So is the idea that before the extra 36
19 months that I'm ordering to be concurrent, that he may have
20 less than 60 months left? Is that the idea?

21 MR. LEVIN: Not in terms of credit.

22 THE COURT: Sorry. I said concurrent. I meant
23 consecutive.

24 MR. LEVIN: I understood the Court's point.

25 Not in terms of credit, but if he were let's say to

1 get into the RDAP program or some of the other programs they
2 have there, once the program is completed, their sentence is
3 shortened. But he would lose some of that time if this
4 sentence doesn't kick in.

5 It is my understanding before Mr. Hirst came up here
6 and was transferred on this case, he was being accepted in
7 RDAP. He was on his way to that. He would lose that.

8 For instance, the drug and alcohol program in
9 prison -- since he was already starting that program when he
10 was transferred up here, I don't want him to lose that time.
11 It may be academic. I'm just asking because it may help him a
12 little bit at the back end.

13 THE COURT: Let me ask you a question.

14 Do you think this is something I need to rule on now,
15 or is it something I can decide whether to put that language in
16 the judgment?

17 Do you think I need to say that orally? Because what
18 I'd like do is look at the provision the government has cited
19 and check with the probation department to determine if this
20 really may have any practical difference.

21 MR. LEVIN: Your Honor is free to amend your judgment
22 at any time. You do not have to give it to me --

23 MR. QUIGLEY: I don't think that's right, your Honor.

24 THE COURT: You think I need to say it publicly today?

25 MR. QUIGLEY: No. That you're free to amend the

1 judgment at any time.

2 THE COURT: I'm not talking about an amended judgment.
3 If I do the judgment on Monday and I want to look at this over
4 the weekend just to look at the provisions cited, is there any
5 reason this needs to be stated in open court here at
6 sentencing?

7 MR. LEVIN: I understand your Honor's point. He
8 doesn't get it unless it's in his judgment.

9 THE COURT: I understand that.

10 MR. LEVIN: If the Court wants to research that, we're
11 fine with that.

12 MR. QUIGLEY: Your Honor, I think my point in citing
13 that provision is that he's -- the only credit he can get for
14 time served before today is the Gerova time he's already
15 serving. I'm not sure there is any authority to make the
16 sentence nunc pro tunc. He got a substantially below-guideline
17 sentence for a variety of reasons.

18 THE COURT: You may well be right. I'm just trying to
19 figure out what difference it will make, and I haven't quite
20 gotten a direct answer as to what difference it will make.

21 MR. LEVIN: It may make no difference at all,
22 your Honor. However, if he completes the RDAP program and they
23 decide to take a year off of his sentence, it may let him out a
24 little earlier because the way they calculate that time, that
25 credit, is on the back end, not the front end.

1 In other words, he doesn't earn that credit until the
2 program is complete. That's really the issue here. That's how
3 I view it.

4 THE COURT: I'll tell you I'm inclined to deny this
5 request, but what I am going to do is just look at the
6 provision that the government cited. I'm going to consider the
7 request. I'll either put it in the judgment or I won't. I
8 don't expect to, but I will take a look at it. Okay?

9 MR. LEVIN: Thank you, your Honor.

10 THE COURT: Is there any legal reason why this
11 sentence cannot be imposed as stated?

12 MR. QUIGLEY: No, your Honor.

13 MR. LEVIN: No, your Honor.

14 THE COURT: So that's the sentence of this Court,
15 Mr. Hirst. You have a right to appeal your conviction and
16 sentence, except to whatever extent you may have validly waived
17 it as part of a plea agreement.

18 If you do choose to appeal, the notice of appeal must
19 be filed within 14 days of the judgment of conviction. If
20 you're not able to pay for the costs of an appeal, you may
21 apply for leave to appeal in forma pauperis which simply means
22 that court costs such as filing fees will be waived. If you
23 request, the clerk of court will prepare and file a notice of
24 appeal on your behalf.

25 There are no open counts. Is there an underlying

1 indictment that needs to be dismissed?

2 MR. QUIGLEY: There is, your Honor. This is S3, and
3 there is an S1.

4 THE COURT: I'm going to dismiss the underlying
5 indictment.

6 Are there any other applications at this time?

7 MR. QUIGLEY: Not from the government, your Honor.

8 MR. LEVIN: No, your Honor.

9 THE COURT: All right. We're adjourned.

10 (Adjourned)

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